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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 334

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JOSEPH E. SEAGRAM & SONS, INC.,
*Petitioner,*

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.**

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JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ALFRED D. VAN BUREN,
*Counsel for Petitioner.*

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# No. 334

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JOSEPH E. SEAGRAM & SONS, INC.,
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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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Comes now Joseph E. Seagram & Sons, Inc., by its attorneys, Joseph E. Davies, Raymond N. Beebe and Alfred D. Van Buren, and prays that a writ of certiorari issue from this Court to review the judgment of the Court of Claims entered in the above cause on February 3, 1941, dismissing its petition (R. 10). A motion for new trial made by petitioner was denied May 5, 1941 (R. 10).

### Summary and Statement.

This is an action for the recovery of $1,452.20, same being the then Internal Revenue tax of $2.00 per proof gallon on 726.6 proof gallons of spirits, viz., gin, which were lost

and destroyed in petitioner's distillery at Lawrenceburg, Ind., on August 24, 1936.

In connection with and as a part of its distillery, petitioner had provided a cistern room or building, as required by law, containing receiving cisterns or tanks into which all spirits produced in its distillery were conveyed and held prior to being drawn off into casks or packages and removed into the warehouse. At petitioner's distillery, the cistern room was located about 450 feet from the distillery building and spirits were transferred or pumped from the distillery to the cistern room by pipe lines. These pipe lines were connected with manifolds located in a room constructed on a balcony on the outside of the cistern room, the door thereto being secured with a Government lock, the key to which was required to be held at all times by the Government officer (storekeeper-gauger) in charge of the plant. Separate pipes ran off from the manifolds to each of the receiving cisterns or tanks in the cistern room, the flow of spirits to the respective cisterns or tanks being regulated and controlled by valves attached to the pipes at the manifolds. In order to change the flow of spirits, it was necessary to call the storekeeper-gauger who would unlock the door to the balcony room and the valves would then be adjusted to allow the spirits to flow into the desired cistern or tank (R. 4-5).

On the night of August 24, 1936, a pumping order had been issued by petitioner's employee directing that a quantity of gin be pumped from the so-called gin house of the distillery into cistern or tank No. 14 in the cistern room which was empty at the time. Such employee, however, failed to properly adjust the valves and when the pumping began the gin ran into cistern or tank No. 15 which was full or partly full, instead of into cistern or tank No. 14, resulting in an overflow from said cistern or tank No. 15

of 726.6 proof gallons constituting the loss in question (R. 6).

Such loss was promptly reported and a claim for the remission of the tax presented which was denied. The tax was then assessed by the Commissioner and paid to the Collector pursuant to his demand. A claim for refund was then presented which was also rejected (R. 6) and thereafter this action to recover the said tax was instituted in the Court of Claims hereinafter referred to as "the Court" (R. 1). (Judicial Code, Sec. 145 (1); 28 U. S. C. A. 250 (1)). As above stated, judgment was entered February 3, 1941, dismissing the petition, the decision of the court being reported in 36 Fed. Sup. 1013 (R. 10). Petitioner thereupon made a motion for a new trial which was denied May 5, 1941 (R. 10).

**Statutes Involved.**

The establishment and operation of distilleries were, at the time of the loss in question, under the provision of various Internal Revenue Laws (now Internal Revenue Code) and Regulations issued pursuant thereto. While such provisions are numerous, reference will be made only to those directly relevant to the issues presented. Unless otherwise indicated, such references will be to sections of Title 26 of the United States Code, 1934 Edition, in effect at the time, with corresponding sections of the Internal Revenue Code noted. The taxing provisions referred to in the court's opinion are set forth below. Other relevant statutes are set forth in the Appendix. (pp. 20-23).

26 U. S. C. A. 1150 (a) (1); (Sec. 2800 (a) (1) I. R. C.):

> *Tax Rate:* "On and after January 12, 1934, there shall be levied and collected on all distilled spirits produced in or imported into the United States an internal-revenue tax at the rate of $2.00 on each proof

gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond."

26 U. S. C. A. 1150 (b); (Sec. 2800 (b) I. R. C.):

"*Time for payment; bonded distilled spirits; distilled spirits not bonded:* The tax upon any distilled spirits removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, * * *".

**Questions Presented.**

As above stated, the only issue involved is whether the tax on spirits lost in the distillery was legally and properly assessed. This question, however, involves the interpretation and construction of the foregoing statutory provisions and petitioner contends that the court has erred in this regard. The questions presented, therefore, may be considered under the following assignments of error:

1. In holding that the tax sought to be recovered was due and properly assessed under 26 U. S. C. A. 1150 (b).

2. In holding that 26 U. S. C. A. 1197 had no application to the case at bar.

3. In holding that if 26 U. S. C. A. 1197 were applicable, petitioner is entitled to relief only if the spirits were lost without negligence on its part.

The court has held that while the loss was of gin, the spirits subject to tax, viz., alcohol, had come into "existence as such", that the tax had attached thereto (26 U. S. C. A. 1150 (c)) and, having attached, "it must be payable

at some time thereafter". Based on this reasoning, the court then held that "since the spirits were never deposited in bonded warehouse, the provision fixing the time of payment as the time when they were withdrawn therefrom, cannot be applicable" (26 U. S. C. A. 1150 (a) (1)) but "that the case comes squarely within the provision for the payment of the tax when it is removed from a distillery to a place other than a bonded warehouse" (26 U. S. C. A. 1150 (b)) and that the assessment was made under said section (R. 8-9).

The petitioner, however, contends that, having produced 80 per centum of the surveyed capacity and accounted for all the spirits produced during August 1936, as required by 26 U. S. C. A. 1197, (Appendix, p. 22), including the spirits lost, it was not liable to assessment for such loss and that such loss did not constitute a "removal" under 26 U. S. C. A. 1150 (b) (*supra*, p. 4). The assessment not having been made under Section 1197, as held by the court, it must be assumed that there was no deficiency, no excess materials used and that petitioner had fully accounted for all spirits produced.

**Reasons for Allowance of the Writ.**

1. The decision and judgment of the Court of Claims is unjustified, unwarranted and contrary to law.

2. The question presented has not heretofore been considered by the courts, except in an action previously instituted by petitioner, involving a similar loss (*Seagram* v. *Smith, Collector*, 113 F. (2d) 357) referred to in the court's opinion (R. 10) and discussed in petitioner's brief attached.

3. The question presented is of great importance not only to distillers but to the Government.

4. If spirits lost and destroyed in a distillery are to be treated as having been "removed from the place where they

were distilled and not deposited in bonded warehouse", thereby making same subject to assessment as held by the court, a very serious problem is encountered, for losses are certain to occur in distilleries from various causes and distillers will be granted no relief whatever.

5. The decision herein sought to be reviewed seriously affects the operations of petitioner as distiller, and all other distillers and it is necessary to obtain a final determination as to the tax liability for losses occurring in a distillery.

WHEREFORE, it is respectfully submitted that the writ of certiorari be granted.

Respectfully submitted,

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